

1/24/02

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 20
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sansegal Sportswear, Inc.

v.

Edward Conna

Opposition No. 110,545
to application Serial No. 77/228,561
filed on January 7, 1997

Grant R. Clayton of Clayton, Howarth & Cannon, P.C. for
Sansegal Sportswear, Inc.

Edward Conna, pro se.

Before Cissel, Seeherman and Hairston, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On January 7, 1997, applicant filed the above-
referenced application to register the mark shown below

Opposition No. 110,545

on the Principal Register for "clothing, namely t-shirts, hats, athletic wear, shorts, jackets, sweatshirts, sweat pants, boots, shoes, gloves and socks," in Class 25. The application was based on applicant's claim of use of the mark in commerce in connection with the named goods since September of 1996. Applicant subsequently amended the application to delete the reference to "athletic wear," and the application was passed to publication.

A timely Notice of Opposition was filed on May 18, 1998 by Sansegal Sportswear, Inc. As grounds for opposition, opposer alleged ownership of Registration No. 1,915,006¹ for the mark "ATTITUDE" in connection with "clothing and sportswear, namely jackets, sweatsuits, shorts, swimwear, and shirts, t-shirts, sweatshirts, hats and tanktops," and Registration No. 1,885,033² for the mark "ATTITUDE ANYWEAR" in connection with the same clothing items listed in Registration No. 1,915,006. Opposer claimed that its registered trademarks have been in continuous use since before the date of first use alleged by applicant in the application and asserted that

¹ Reg. No. 1,915,006 was issued on August 29, 1995 with a claim of first use on October 1, 1985, and subsequently was assigned to opposer; Section 8 affidavit accepted.

² Reg. No. 1,885,033 was issued on March 21, 1995 with a claim of first use on May 1, 1989, and was subsequently assigned to opposer; Section 8 affidavit accepted.

the mark applicant seeks to register so resembles
opposer's marks that confusion is likely.

Applicant's answer denied that confusion is likely.

A trial was conducted in accordance with the
Trademark Rules of Practice, but only opposer took
testimony and offered evidence. Only opposer filed a
brief. No oral hearing before the Board was requested.

Opposer made of record the pleaded registrations,
the testimony of Noah Rudick, its founder and president,
as well as official records of the Patent and Trademark
Office with regard to other proceedings in which opposer
has policed its registered mark, and applicant's
responses to opposer's discovery requests, also submitted
with opposer's Notice of Reliance.

After careful consideration of the record before us
in this proceeding as well as the pertinent legal
precedents, we find that confusion is likely.

In view of opposer's unchallenged pleaded
registrations, priority is not an issue before us in this
proceeding, but even if it were, the testimony and
evidence establish that opposer used its marks well
before the date that applicant began using his mark, as

shown by applicant's response to opposer's discovery request.³

³ Opposer's argument that it is entitled to judgment because applicant's responses to opposer's discovery requests specify a date of first use which is later than the first use date claimed in the application as filed is not well taken. To the extent that opposer is arguing that the opposition should be granted on the basis of fraud, opposer is not correct. Judgment may not be rendered on an unpleaded ground. Moreover, even if fraud had been pleaded, the claim would fail for the immateriality of the alleged misrepresentation.

In *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set forth the factors to be considered in determining whether confusion is likely between trademarks. The similarities between the marks and the relatedness of the goods or services specified in the respective application and registrations are key considerations. When the goods in question are virtually identical, the degree of similarity between the marks necessary to support the conclusion that confusion is likely declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). In the case now before us, the goods are in part identical.

We turn, then, to consideration of applicant's mark vis-à-vis opposer's mark "ATTITUDE." It is well established that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on the consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In the instant case, applicant has completely appropriated opposer's registered mark "ATTITUDE." Applicant adds the

word "SEVERE" to the registered mark as an adjective which modifies the registered mark.

Confusion has been found to be likely where a newcomer has appropriated the entire mark of the registrant, adding to it only a term which does not create a meaningful distinction between the marks. In *re Denisi*, 225 USPQ 624 (TTAB 1985). Such is the case here. In view of the testimony making clear the fact that opposer's clothing is sold to skiers and to other "extreme sports" enthusiasts, it is reasonable to conclude that prospective purchasers of applicant's jackets, for example, might well interpret the "SEVERE ATTITUDE" mark as an indication that the clothing on which the mark is used is another line of goods from the makers of "ATTITUDE" brand jackets, the "SEVERE ATTITUDE" products being intended for more severe weather conditions.

That applicant's mark is presented in a stylized form does not reduce the likelihood of confusion. Opposer's registration shows the "ATTITUDE" mark in typed form, and therefore the scope of protection of this mark extends to the type font used in applicant's mark. As for the stylized presentation of the first two letters of the words in applicant's mark, they would clearly be

perceived as those letters. Moreover, the similarities in the pronunciations and connotations of these marks plainly overcome any distinction which could be drawn from the graphic presentation of applicant's mark. It is well settled that in determining likelihood of confusion, when we evaluate similarities in pronunciation, appearance and connotation, similarity in any one of these elements can be sufficient to provide the basis for finding that confusion is likely. In re Oil Well Company, 181 USPQ 656, TTAB 1973).

In summary, we find confusion between applicant's mark and the registered mark "ATTITUDE" to be likely because these marks create similar commercial impressions, and the goods set forth in the application are in part identical to those listed in the cited registration. Any doubt as to this conclusion would necessarily be resolved in favor of the prior user and registrant. Medtronic, Inc. v. Medical Devices, Inc., 204 USPQ 317 (TTAB 1979).

For similar reasons, we find that confusion is also likely between applicant's mark and opposer's other pleaded registered mark, "ATTITUDE ANYWEAR." Just as "SEVERE ATTITUDE" clothing is likely to be mistakenly assumed to come from the same source as "ATTITUDE"

Opposition No. 110,545

clothing, prospective purchasers of t-shirts, for example, who are familiar with opposer's "ATTITUDE ANYWEAR" shirts would assume "SEVERE ATTITUDE" shirts originate from the same source. The marks create similar commercial impressions, and they are used on identical products.

We specifically note that our decision sustaining this opposition is not based on opposer's assertion that it is entitled to judgment because applicant did not introduce evidence during his testimony period. Opposer has provided neither an established legal basis nor persuasive reasoning for taking such a position. Opposer has the burden of proof in establishing its pleaded claims, and if opposer had not met this burden, applicant would have been entitled to judgment.

Nor is our decision based on opposer's claim that its mark is famous. The record does not support this factual conclusion, but, as detailed above, even without persuasive evidence that opposer's "ATTITUDE" mark is famous, it does support our finding that confusion is likely.

DECISION: The opposition is sustained.